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June 10, 1996

Office of the Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, D.C. 20554

Re: In the Matter of Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information
FCC 96-221; CC Docket No. 96-115

Dear Secretary:

Pursuant to C.F.R. Sections 1.415 and 1.419, enclosed is the original and 18 copies of Comments of the Washington Utilities and Transportation Commission (including two copies marked "Extra Public Copy") regarding the above referenced matter.

Very truly yours,

Steven W. Smith

STEVEN W. SMITH
Assistant Attorney General

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Enclosures

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Before the
Federal Communications Commission
Washington, D.C. 20554

FCC 96-221

In the Matter of	)	
	)	
Implementation of the	)	
Telecommunications Act of 1996:	)	CC Docket No. 96-115
	)	
Telecommunications Carriers' Use of	)	
Customer Proprietary Network Information	)	
and Other Customer Information	)	

COMMENTS

OF

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

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I. INTRODUCTION AND SUMMARY

This rulemaking should not involve a significant amount of regulation, but it could very well be one of the most important rules established by the FCC. The question confronting the FCC and state commissions is whether the convergence of technologies and the increased potential for communications competition contemplated by the Telecommunications Act of 1996[1] will result in a further erosion of individual privacy or in protection of consumer ownership of personal information.

While the NPRM requests comment on a range of issues, our comments will focus on the most material questions to be resolved. These include the scope of federal and state responsibilities under the Act, the implementation of notification and authorization procedures for the release of CPNI, and the meaning of the term "telecommunications service".

In our comments, we emphasize protection of customer confidentiality and privacy interests, and recommend: 1) that the FCC should accommodate state interests in adopting notification and authorization requirements, as it did in setting Caller ID rules; 2) that written notification and authorization should be required;

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[1] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("the Act" or "1996 Act").

3) that the term "telecommunications service" should refer to traditional service distinctions; and 4) that existing CPNI rules should remain in place until superseded by new rules.

II. THE SCOPE OF FCC AUTHORITY (NPRM ¶¶ 16-19)

For the most part, the outlines of state and federal authority are clear in this area. As a general proposition, under Section 2(b) of the 1934 Communications Act and the United States Supreme Court's decision in Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 370, 106 S. Ct. 1890, 90 L. Ed. 2d 369 (1986), FCC authority is limited to regulation of interstate telecommunications service, while intrastate regulation is reserved to the states. Nothing in the 1996 Act alters this allocation of roles with respect to CPNI.[2] The jurisdictional rule is subject, however, to the "impossibility" exception, which permits preemption of state regulations that effectively negate FCC regulation within the interstate jurisdiction.

The "impossibility" exception was applied in a Computer III opinion to uphold federal preemption of conflicting state regulations regarding prior authorization for use of CPNI. California v. FCC, 39 F.3d 919 (9th Cir. 1994), cert. denied, 115 S. Ct. 1427, 131 L. Ed. 2d 309 (1995). The "impossibility" exception is a narrow one, however, and the FCC bears the burden of establishing that any challenged

[2] The suggestion in NPRM ¶18 that Sections 222 or 275 "by themselves" give the FCC authority over intrastate CPNI matter is not well founded. There is no express enumeration of these provisions as exceptions to Section 2(b). Section 601(c)(1) of the 1996 Act precludes the interpretation that the sections impliedly amend Section 2(b).

state regulation negates its own regulatory scheme. This showing was successfully made with respect to the FCC's current CPNI rules.[3] Presumably, new FCC regulations will have to meet the same test.

While the FCC may have some ability to preempt the states in this area, this Commission suggests that such preemption may not be necessary or appropriate. The FCC and the state commissions have addressed privacy questions before, on the issue of Caller ID. In that proceeding, we argued that control of private information was essentially a matter to be determined by the individual to the extent possible, and that the decision about the proper scope of that privacy should not be made on a blanket basis for all individuals at the national level.[4] The FCC did not preempt state privacy protections in the Caller ID area and the resulting regulatory scheme has been workable. Likewise here, the FCC should regulate in a manner which allows states flexibility in providing a preferred level of privacy protection.

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[3] In keeping with the narrow nature of the exception, the Ninth Circuit's holding was narrowly drawn to uphold preemption on the ground that "conflicting state rules regarding access to CPNI would negate the FCC's goal of allowing the BOCs to develop efficiently a mass market for enhanced services for small customers." California v. FCC, 39 F.3d at 933. To the extent that the relationship between CPNI and non-structural safeguards changes, *see* NPRM ¶¶ 40-42, the rationale for preemption may be altered or significantly reduced. Given the emphasis in Section 222 of the 1996 Act on protecting confidentiality, a regulatory goal which emphasizes enhancement of competition over customer privacy may no longer be appropriate.

[4] In the Matter of the Rules and Policies Regarding Calling Number Identification Service, CC Docket 91-281, Comments of the Washington UTC, January 2, 1992, pp. 2-8.

To the extent that any new FCC rules may have preemptive effect, the Washington UTC urges that the federal regulations create strong protections for customer rights of privacy to personal information. Weak national rules which have the effect of preventing states from providing protection to their citizens are an undesirable result.

III. DEFINING "TELECOMMUNICATIONS SERVICE" UNDER SECTION 222 (NPRM ¶¶ 20-26)

We agree with the tentative conclusion of the FCC that the interpretation of the scope of the term "telecommunications service" as used in Section 222(c)(1) should be understood to refer to traditional service distinctions. As carriers begin offering more than one traditional service (e.g., interstate toll and local service), prior customer authorization would be required if CPNI used in the provision of one service is required to provision another service. Carriers could implement requirements to restrict use of CPNI from one telecommunications service to another using procedures similar to those in place today under current CPNI rules (e.g., restricted computer system access).

Restricting the use of CPNI between traditional telecommunications services enhances customer privacy and addresses competitive concerns by preventing carriers from using their customer information base to lever themselves into new markets at the expense of carriers that do not have such data.

In the future, the term "telecommunications service" will likely come to mean something different than its meaning today and may require changes to whatever CPNI restrictions are implemented as a result of this rulemaking. Therefore, while it is appropriate to implement Section 222(c)(1) using a traditional definition approach, carriers and regulators should be prepared to refine the approach as circumstances change.

IV. CUSTOMER NOTIFICATION OF CPNI RIGHTS/PRIOR AUTHORIZATION (NPRM ¶¶ 27-33)

The Notice seeks comment on what methods a carrier may use to obtain customer authorization for use of CPNI, and tentatively concludes the carriers should be required to notify customers of their right to restrict access to their CPNI, before they waive that right, in order to be considered to have given approval.

The Notice also seeks comment on whether written or oral approval should be required and the least burdensome method of notification. As further discussed below, the Washington UTC supports written notification to customers of their privacy rights in CPNI, and a requirement of prior written authorization before their CPNI is disclosed.

With the convergence of technologies and the advent of competition, problems relating to customer protection of their privacy will increase. The need

for protection arises in a variety of situations. One illustration can be found in recent complaints received by our Consumer Affairs division about certain telemarketing practices. A number of local exchange company customers with unlisted numbers have been receiving telemarketing calls. These calls are coming from a telemarketing firm hired by the LEC to market the LEC's services. It appears that the unlisted numbers are being disclosed to the marketing firm without the customer's consent, despite the fact that the customer has non-published service. The 1996 Act should provide a means for federal and state regulators to address this kind of problem reported by customers.

While the Washington UTC agrees with many of the points made in this section of the NPRM, a comment on the matter of emphasis is appropriate. For example, in paragraph 27, the NPRM generally describes Section 222(c)(1) as "authorizing" carrier use of CPNI for any purpose, so long as the customer approves. This paraphrase of the statute misstates its fundamental purpose. The primary intent of Section 222(c)(1) is to strictly limit carrier use and access to CPNI, not to "authorize" access. The term "authorize" does not appear in the subsection.[5] In paragraph 28, the NPRM goes on to refer the customer's "right to

[5] The heading of Section 222(c) reads "Confidentiality of Customer Proprietary Network Information," while that of subsection (c)(1) reads "Privacy Requirements for Telecommunications Carriers."

restrict access" to CPNI, creating the implication that there is a general right of access to CPNI on the part of carriers which the customer must take affirmative action to restrict. Again, this is at odds with the overall language and intent of Section 222. The difference in perspective is critical.

The starting place for ascertaining the intent of Section 222 and the proper focus of new rules is Section 222(a). This section of the Act says that carriers have a duty to protect the confidentiality of customer data. We interpret Section 222(a) to mean that carriers have an affirmative obligation to exercise due diligence in the protection of customer information. Allowing subscriber information to be easily, and possibly quite unintentionally, disclosed for purposes not authorized by the Act, is inconsistent with the affirmative obligation to protect such information.

The loss of a consumer's privacy should not occur by default, by virtue of a failure to take affirmative action to assert the right. The customer's inherent privacy right in CPNI is now underlined by the statutory protection afforded by Section 222. Any waiver of those rights should be knowing and voluntary. We agree with the FCC's statement in NPRM ¶ 28 that in order to ensure proper waiver, notification to customers of their rights is essential. While the FCC observes in NPRM ¶29 that written notification is preferable, we would suggest that it is essential. Customers should receive notification from carriers, annually,

explaining their right to confidentiality of information, that the Act requires carriers to protect individual customer information, and what information is released and under what circumstances (i.e. aggregate information and subscriber listings).

Once notification has been provided, the second essential step in protecting customer information is an authorization requirement for a carrier that wishes to use CPNI for any purpose other than those permitted under Section 222. We strongly agree with the FCC's conclusion in NPRM ¶29 that "[w]ritten authorization provides greater protection to both customers and the carrier than oral authorization, in that the former advises customers in writing of their CPNI rights and provides the carrier with evidence . . . " The use of a letter, or a billing insert with a postcard to be returned if the customer wishes to authorize use, is an acceptable and effective means to accomplish notification and authorization.

The Washington UTC recommends against any rule which permits carriers to obtain oral authorization for use of CPNI during outbound marketing calls. Such an approach is not consistent with the intent of Section 222 to make customers confidentiality a priority. Given the potential for abuse, for customer confusion, for inconsistency in company and industry practice, and the difficulty of verification, the Act should be interpreted to require written authorization as the only effective and verifiable method, unless the Act specifically authorizes oral authorization.

Since, in our view, Section 222(d)(3) would allow oral authorization for the duration of a customer initiated call, the exception is specifically permitted under Section 222 and written authorization would not be required.

V. APPLICABILITY OF COMPUTER III CPNI REQUIREMENTS (NPRM ¶¶ 38-42)

The Notice requests comment regarding disposition of the existing CPNI rules that apply to AT&T, GTE and the BOCs. We recommend that the existing rules stay in place until superseded by rules implementing Section 222 of the Act. Effective procedures for protecting access to CPNI are already in place under existing CPNI rules. In order to avoid a gap in protection for customers, restrictions on AT&T, GTE, and the BOCs should continue until adequate replacements have been developed and implemented under the Act.

In this context, it is important to note that while existing CPNI rules provide important protections, they are targeted quite narrowly, with a focus on multi-line business customers and on CPE and enhanced services. Much of the emphasis was placed on fair competitive use of the information. By contrast, the provisions of Section 222 have broad application to every customer of every tele-communications carrier, including AT&T, GTE, and the BOCs. The section emphasizes confidentiality and privacy concerns. To the extent that regulations

are adopted which are consistent with the intent of the Act, the end result should be stronger protection for customers across the board than that which exists under current law.

As competition develops special regulatory treatment for dominant carriers should become less necessary. In this transitional period, however, the Commission believes continuation of such treatment should be considered, particularly with respect to the BOCs and GTE, given their present significant market power in the local exchange.

VI. CONCLUSION

As competition increases, the demand for identifiable individual customer data will increase. This increased demand, combined with the continually improved ability to collect and use such information, is likely to result in increased marketing opportunities for the industry, but also in decreased privacy for the consumer.

The Washington UTC supports the efforts of the FCC to ensure that customers rights to privacy and to confidentiality of personal data be protected. While competitive fairness in the treatment of CPNI is also important, where the two interests conflict, the rights of the customer must be given precedence. To

the extent possible, the FCC and the states' efforts to further the interests of privacy and competition should proceed on a joint and cooperative basis.

DATED this 10th day of June, 1996, at Olympia, Washington.

SHARON NELSON, Chairman
Washington Utilities and Transportation Commission

RICHARD HEMSTAD, Commissioner
Washington Utilities and Transportation Commission

WILLIAM R. GILLIS, Commissioner
Washington Utilities and Transportation Commission